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February 7, 1997

VIA HAND DELIVERY

Mr. William Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20554

Re: Compañia Teléfonos De Chile - Transmisiones Regionales S.A.'s Comments In The Matter Of International Settlement Rates (IB Docket No. 96-26)

96-261

Dear Mr. Caton:

Compañia Teléfonos de Chile - Transmisiones Regionales S.A. ("CTC"), by its attorneys, hereby submits for filing an original and five copies of their Comments in connection with the above-captioned matter.

Also enclosed is an additional copy of CTC's Comments which we ask you to date stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Alfred M. Mamlet
Counsel for Compañia Teléfonos de Chile
- Transmisiones Regionales S.A.

/srh-m
Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of International Settlement Rates	IB Docket No. 96-26

COMMENTS OF COMPAÑIA TELÉFONOS DE CHILE - TRANSMISIONES REGIONALES S.A.

COMPAÑIA DE TELÉFONOS DE CHILE
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Dated: February 7, 1997

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COMMENTS OF COMPAÑIA TELÉFONOS DE CHILE - TRANSMISIONES REGIONALES S.A.

I. SUMMARY AND INTRODUCTION

Compañia Teléfonos de Chile - Transmisiones Regionales S.A. ("CTC Mundo") hereby submits comments in the above-captioned proceeding. While CTC Mundo agrees with the Commission and the International Telecommunications Union ("ITU") that the international settlement rates should continue to decrease, the unilateral approach proposed in the notice of proposed rulemaking is not the way to proceed.[1/]

As a legal matter, the Commission simply has no jurisdiction to take "enforcement action" against foreign carriers. More fundamentally, the NPRM's proposal contradicts existing U.S. international obligations, which require the United States to negotiate accounting rates on a bilateral or multilateral basis. There is, in short, no legal basis for the unilateral Commission action proposed here.

1/ See International Settlement Rates, Notice of Proposed Rulemaking, FCC 96-484 (rel. Dec. 19, 1996) ("NPRM").

Nevertheless, if the Commission presses ahead with its unilateral approach, it should harness, not bridle, competitive forces abroad. Specifically, the Commission should follow its own lead, established in its Market Entry Order and Flexibility Order, to encourage development of competitive markets and permit these markets to so what they are best at -- setting competitive settlement rates. To this end, CTC Mundo strongly agrees with the NPRM's proposal not to apply its proposed benchmarks to countries committed to competitive reform. To do so would be both unnecessary and counterproductive.

II. THE COMMISSION DOES NOT HAVE THE JURISDICTION TO UNILATERALLY IMPOSE SETTLEMENT RATES ON FOREIGN CARRIERS

The Commission does not have the jurisdiction to unilaterally impose settlement rates on foreign carriers, or to take enforcement action against those that do not comply. In addition, such unilateral Commission action would violate the binding international commitments of the United States.

The Commission's proposal is a direct attempt to control the actions and policies of foreign carriers and governments. Not only does the NPRM propose new settlement benchmarks, but it also proposes to take direct enforcement action against foreign carriers who fail to comply with them.[2/] In addition, the NPRM would impose the Commission's own policy choices on foreign carriers and governments. Of particular concern is the Commission's attempt to impose its own limited notion of economic efficiency on other countries' markets, irrespective of those countries' other objectives,

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[2/] NPRM ¶¶ 63, 87, 89 & 90 (proposing to target for enforcement actions those foreign carriers that fail to comply with Commission-imposed benchmarks; require foreign carriers to comply with Commission-imposed deadlines; require U.S. carriers to breach existing accounting rate agreements; and impose retroactive settlement rates on foreign carriers and provide refunds for prior periods).

such as universal and infrastructure development -- objectives that the remain important even in the United States today. These attempts to exert control over foreign carriers and governments are the very essence of regulation.[3/]

A. The Commission Does Not Have Jurisdiction To Regulate Foreign Carriers

Section 2 of the Communications Act gives the Commission jurisdiction over only "**persons engaged within the United States** in such [international] communication or such transmission. . . ."[4/] Section 2(b) specifically denies the Commission jurisdiction over foreign carriers engaged in communication in the United States "solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier. . . ."[5/] The Commission thus lacks statutory jurisdiction to regulate foreign carriers that receive U.S.-originated calls from interconnected U.S. carriers and that terminate them in a foreign country.

The Commission also lacks authority to take enforcement action invalidating contractual arrangements between U.S. and foreign carriers. The Supreme Court has instructed the FCC in Regents v. The University System of Georgia v. Carroll that: "We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others."[6/] Because it lacks the power to invalidate contracts with foreign carriers, the Commission must choose

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[3/] "Regulate" means "to control or direct according to rule, principle, or law" or "to adjust to a particular specification or requirement." American Heritage Dictionary 1521 (3d ed. 1992).

[4/] 47 U.S.C. § 152 (emphasis added).

[5/] 47 U.S.C. § 152(b)(2).

[6/] 338 U.S. 586, 602 (1950).

one of three options: (1) to accept that U.S. and foreign carriers have valid contracts; (2) to require U.S. carriers to absorb the difference between settlement rates and acceptable charges that may be passed on to U.S. consumers; or (3) to persuade U.S. and foreign carriers to consent to mutual cancellations (or revisions) of the contracts.

The Commission's assertion of jurisdiction over foreign carriers' rates is troubling not only because it seeks to regulate third parties, but also because it infringes the sovereignty of foreign countries. As the National Telecommunications and Information Administration ("NTIA") has previously told the Commission:

> Foreign governments and their telecommunications administrations ("TAs") maintain independent sovereign authority over the foreign end of a call. **Because the Commission cannot compel foreign entities to accept accounting rates prescribed by the Commission for U.S. carriers, there are practical limits to the usefulness of the Commission's prescription authority.**[7/]

In short, the Commission does not have the jurisdiction to impose accounting rates on foreign carriers operating in foreign jurisdictions -- which is precisely what the Commission's proposal seeks to do.

B. The Commission's Unilaterally Attempt To Impose Benchmarks Of Foreign Carriers Violates U.S. International Commitments

The NPRM's proposal to impose settlement rates on foreign carriers not only overreaches its statutory jurisdiction, but also violates a number of U.S. international commitments. In particular, the Commission's proposal directly conflicts with the ITU's Convention and Regulations, which expressly provide that

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[7/] Comments of the National Telecommunications and Information Administration, In the Matter of Regulation of International Accounting Rates, CC Docket No. 90-337, 17 (Oct. 12, 1990) (emphasis added).

accounting rates shall be established through mutual agreement. The enforcement actions could also constitute illegal expropriations, subjecting the United States to claims for compensation in various arbitral proceedings.

First, the United States, as a party to both the ITU Regulations and Convention,[8/] is obligated to comply with their provisions. These provisions require that accounting rates be negotiated, not dictated. In particular, ITU Regulations expressly state that:

> For each applicable service in a given relation, administrations [or recognized private operating agencies ("RPOAs")] **shall by mutual agreement establish and revise accounting rates to be applied between them** . . . .[9/]

This provision is unequivocal: accounting rates cannot be unilaterally established or unilaterally revised.

Second, any Commission enforcement action that deprives foreign carriers of contractual rights would subject the United States to expropriation claims. Chile and numerous other countries could bring an expropriation claim in arbitral proceedings under "Bryan treaties." The Bryan treaties allow a party, in the absence of diplomatic or other arbitral remedy, to submit any dispute, regardless of its nature, to a

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[8/] International Telecommunication Convention, done at Nairobi, Nov. 6, 1982, S. Treaty Doc. No. 99-6 (1985) (entered into force for the United States definitively Jan. 10, 1986) ("ITU Convention"); International Telecommunication Regulations: Telephone and Telegraph Regulations, done at Melbourne, Dec. 9, 1988, S. Treaty Doc. No. 102-13 (1991) (entered into force for the United States definitively Apr. 6, 1993) ("ITU Regulations").

[9/] ITU Regulations, App. 1, § 1.1 (emphasis supplied). See also ITU-T Recommendation D.140: Accounting Rates Principles for International Telephone Services, Annex C: Guidelines for Bilateral Negotiation of Accounting Rates and Accounting Rate Shares in International Telephone Service, § C.2.1 (1992, rev. 1995) ("Accounting rates and accounting rate shares are established and revised through bilateral agreement.").

Permanent International Commission constituted pursuant to the treaty. The United States itself invoked a Bryan treaty in 1989 to resolve a dispute with Chile.[10/]

III. THE COMMISSION SHOULD NOT APPLY BENCHMARKS TO COUNTRIES COMMITTED TO COMPETITIVE REFORM

In countries that are already open to competition, the Commission should rely on competition, not a unilateral regulatory decree, to lower settlement rates. As the Commission itself put it:

> [W]e believe the best way to create an alternative to the traditional accounting rate system is to introduce effective competition. Indeed, we believe that in competitive markets our benchmark rates would not be necessary because international call termination rates in such markets will be below any benchmark rates that we adopt.[11/]

Not only would a Commission decision to impose the new benchmarks on these countries be unnecessary, but it could even interfere with the functioning of the marketplace and inhibit the development of full competition. As the Commission stated in its recent Flexibility Order with respect to other aspects of the International Settlements Policy ("ISP"), "where markets are becoming competitive, the ISP's requirements . . . may impede competitive behavior and the development of effectively competitive markets."[12/] The imposition of an artificial benchmark on nascent competitive markets could be no less stifling. The Commission should thus, as it

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[10/] Marian Nash Leich, U.S. Practice, 83 Am. J. Int'l L. 348, 352 (1989) (discussing U.S. invocation of the Bryan treaty between the United States and Chile).

[11/] NPRM ¶ 69.

[12/] In the Matter of Regulation of International Accounting Rates, Fourth Report and Order, Docket No. CC 90-337 ¶ 37 (rel. Dec. 3, 1996) (footnote omitted) ("Flexibility Order").

suggests, refrain from imposing its new benchmarks where countries are open to competition.

A. The Commission Should Not Apply Benchmarks To Countries Which Satisfy The ECO Test

The Commission should not apply its proposed benchmarks to countries which are sufficiently opened to competition to satisfy the Commission's ECO test. The ECO test is designed to determine whether a country's telecommunications market is open to competition, and competition alone should be the ultimate determinant of settlement rates.

A competitive market will itself lead to lower accounting rates. Indeed, the Commission itself acknowledged this causal relationship in its Market Entry Order, when it declined to make cost-based accounting rates a part of its ECO test. In doing so, it stated:

> We believe that additional service providers will increase supply options, and lower foreign calling prices. These actions should stimulate demand, and increased usage of fixed plant should reduce the carriers' average unit costs. In addition, greater demand may increase net revenues thereby reducing foreign carriers' need to rely on settlement payments to finance investment and enabling reductions in the level of accounting rates. Thus, increased global competition will encourage foreign carriers to move accounting rates towards cost-based levels. We therefore believe it would be counterproductive to require cost-based accounting rates as a precondition to foreign carrier market entry.[13/]

Only just recently, in its Flexibility Order, the Commission reiterated its belief that the ECO test provided a good measure of a country's competitive health:

[13/] In the Matter of Market Entry and Regulation of Foreign-affiliated Entities, 11 FCC Rcd. 3873, 3899 (1995).

"We believe that, where the ECO test has been satisfied, the ability of foreign carriers to exercise market power is constrained by the existence, or potential for, competitive entry."[14/] The Commission accordingly concluded that it would permit U.S. carriers to negotiate alternative payment arrangements with any carrier in a foreign country that satisfies the ECO test. The same rationale applies with respect to the Commission's proposed benchmarks: a telecommunications market that is competitive enough to satisfy the Commission's ECO test does not need the FCC to set artificial benchmarks to ensure that its accounting rates are themselves competitive. What it does need is the ability to let competitive forces set the terms of settlement arrangements.

Chile provides a case in point. In many respect, Chile is one of most competitive telecommunications market in the world, a reality that the Commission has itself recognized on several occasions.[15/] Chile satisfies the Commission's ECO test in

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[14/] Flexibility Order ¶ 39.

[15/] See In the Matter of Melbourne International Communications, Ltd., File Nos. 1940 DSE-TC-96(2), ITC-96-492(TC) (rel. Jan. 21, 1997) ("Chile offers effective competitive opportunities in the licensing and operation of earth stations."); In the Matter of AmericaSky Corp., File No. 1821-DSE-TC-96(3) (rel. Dec. 6, 1996) ("Chile's laws and regulatory regime permit U.S. entities to be licensees and operators of international and domestic long distance satellite earth stations in Chile and safeguard against anticompetitive conduct, including discrimination against foreign-owned carriers."); In the Matter of NACS, Inc., File No. ITC-94-434 (rel. Sept. 27, 1996); In the Matter of AmericaTel Corp. Application for Transfer of Control and Pro Forma Assignment of Section 214 Authorizations, 9 FCC Rcd 3993 (1994) (approving Entel Chile's acquisition of 60% of Northland); NACS Communications, Inc., 10 FCC Rcd. 13062 (1995) ("Chile's markets for domestic long distance and international services are becoming more competitive and open to U.S. investment and participation"); AmericaTel Corp., 10 FCC Rcd. 12157 91995) (granting AmericaTel's Section 214 application to acquire facilities for service between the U.S. and Canada and Mexico because of Chile's liberalized telecommunications market); AmericaTel Corp., 10 FCC Rcd. 2901 (1995) (granting AmericaTel's Section 214 application to supplement existing facilities between the United States and various foreign countries because of Chile's progress in liberalizing its telecommunications markets).

every respect.[16/] Most significantly, Chile clearly provides U.S. carriers with the ability to enter the Chilean market and provide international facilities-based service. This ability is more than just a legal right. U.S. carriers are in fact already fully participating in the Chilean market. For example, out of the eleven carriers authorized to provide international services, three have significant U.S. ownership: BellSouth Chile (BellSouth), VTR Telecomunicaciones (Southwestern Bell), and Iusatell (Bell Atlantic).

Notably, as the Commission has already recognized, Chilean law also provides for reasonable and nondiscriminatory charges, terms and conditions for interconnection to Chilean carries' domestic facilities for termination and origination of international services.[17/] Moreover, all access arrangements and prices must be published in tariffs. These tariffs are then reviewed by the Subsecretariat of Telecommunications ("SUBTEL"), the independent regulatory body charged with enforcing Chile's telecommunications law.

In addition, Chilean law also provides for a wide variety of competitive safeguards to further protect against anti-competitive practices. These provisions protect and encourage competition at both the international and local levels. Indeed, in addition to a competitive international market, Chile's traditional local carrier, CTC, now faces competition from a number of other carriers in many local areas, including EntelPhone, VTR (Southwestern Bell), Telefónica Andina, and Telefónica Manquehue,

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[16/] See, e.g., In the Matter of Melbourne International Communications, Ltd., File Nos. 1940 DSE-TC-96(2) (rel. Jan. 21, 1997) ("Chile offers effective competitive opportunities in the licensing and operation of earth stations."). See also In the Matter of AmericaSky Corp., File No. 1821-DSE-TC-96(3).

[17/] In particular, the Commission has found that Law 3-A (amending Law 18,168) requires local companies to provide the same access arrangements to all competing long distance carriers under nondiscriminatory terms and conditions. AmericaTel Order, 9 FCC Rcd. at 4000.

CMET, and Telefónica Del Sur. Such local competition is further assurance that reasonable and nondiscriminatory interconnections are available in Chile.

Yet, despite this highly competitive environment, settlement arrangements in Chile are still subject to the Commission's ISP. It is this regulatory intervention, which has prevented U.S. and Chilean carriers from competing for settlement terms.

The Commission's Flexibility Order should go a long way towards remedying this problem. By allowing carriers to compete for settlement terms, the Commission's Order will allow the market forces at work in the Chilean and U.S. markets to be the final arbiter of settlement terms. Under the Flexibility Order, U.S. international carriers can select settlement rates offered by CTC Mundo, EntelChile, BellSouth Chile or one of the other U.S.-affiliated Chilean carriers. Or, a U.S. international carrier can freely enter the Chilean market and terminate U.S.-Chile traffic itself.

In short, competition, not unilateral regulatory decree, should determine settlement rates on the U.S.-Chile route.

B. The Commission Should Not Condition The Authorizations Of Foreign-Affiliated Carriers On Settlement Rates Within The Commission's Proposed Benchmarks

There is no need for the FCC to condition the authorizations of foreign-affiliated carriers on settlement rates within the Commission's proposed benchmarks. Such carriers and their foreign-affiliates do not have any particular incentive to act anti-competitively. More specifically, and contrary to the arguments of some U.S. carriers, there is simply no incentive for foreign carriers to cross-subsidize their U.S. affiliates, regardless of whether the accounting rates are above-cost or not. As the FCC has already correctly observed:

> This argument, however, appears to ignore the opportunity costs to the foreign parent of offering service through an

> affiliate in competition with U.S. carriers that formerly purchased termination service from the parent. In serving its home market directly through its affiliate, the foreign parent would no longer receive the settlement payment it formerly received from U.S. carriers to terminate traffic in that market.[18/]

In other words, because a foreign carrier that offers service through a U.S. affiliate loses settlement payments that it would otherwise receive from U.S. carriers, it gains no particular advantage. Moreover, the foreign carrier, through its affiliate, must also pay the same costs of providing service in the United States as its unaffiliated competitors do. Thus, the foreign-affiliated carrier does not receive any particular advantage.

Even if there was an incentive for a foreign carrier to subsidize its U.S. affiliate in a monopoly environment, this incentive would not exist in a competitive one. As discussed above, the Commission has itself already observed that a competitive environment will in and of itself work to eliminate any "subsidy" inherent in above-cost rates. There is thus no need for the Commission to condition authorization of foreign-affiliated carriers to the proposed benchmarks on competitive routes. Indeed, such a condition, by tightening foreign entry to the U.S. market, would only serve to limit the very competition that will, of its own accord, bring accounting rates to heel.

IV. CONCLUSION

The Commission's proposal to impose settlement benchmarks on foreign carriers raises significant jurisdictional problems. Not only does the Commission's proposal exceed its statutory jurisdiction, but it also violates a number of U.S. international obligations. The Commission should accordingly refrain from taking such unilateral action.

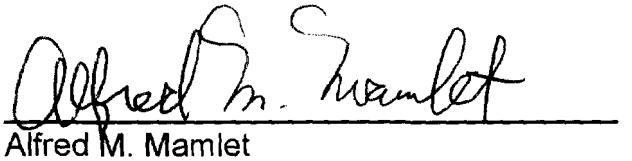
18/ NPRM ¶ 80.

However, should the Commission proceed with its proposal, it should do so with an eye towards its ultimate goal -- achieving competitive telecommunications markets around the globe. To this end, the Commission should wherever possible permit the market to determine settlement rates. In particular, the Commission should, in line with its Flexibility Order, decline to impose its proposed benchmarks on competitive routes. Such a decision will help to ensure that accounting rates are not simply lower, but are truly market-based.

Dated: February 7, 1997

Respectfully submitted,

Compañia de Teléfonos de Chile - Transmisiones Regionales S.A.



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CERTIFICATE OF SERVICE

I, Sandra R. Hammond-Murdico, do hereby certify that a copy of the foregoing **Comments Of Compañia Teléfonos de Chile - Transmisiones Regionales S.A.** has been sent, via first class mail, postage prepaid (or as otherwise indicated), on this 7th day of February, 1997 to the following:

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